

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMES V. CAICO,

Plaintiff,

No. CIV S-02-1608 MCE GGH P

vs.

D. L. RUNNELS, et al.,

Defendants.

FINDINGS & RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is the motion to dismiss pursuant to Fed. R. Civ. P. 12(b) for failure to exhaust administrative remedies filed June 3, 2005, on behalf of defendants Johnson and Taylor-Thomas. On June 29, 2005, plaintiff filed an opposition. After carefully considering the record, the court recommends that defendants' motion be granted.

On January 24, 2005, the court granted and denied in part the February 24, 2004, motion to dismiss for failure to exhaust administrative remedies filed on behalf of defendants Runnels, Roche, Baron, Bates, Hurdle, Uribe, Alston, Carey, Henon-lee, Sandy, Bevan, McClain, Wagner, Greenough, Tan, Henry Schwanke, Bortolamedi, Cribbs, Hirai, Robinson, Wilber and Mitzel. In particular, the court denied the motion to dismiss as to the claims against defendants Roche and Baron for failing to grant plaintiff's request for a medical transfer. The court granted

1 defendants' motion in all other respects.

2 On April 8, 2005, the court granted the motion to dismiss for failure to exhaust  
3 administrative remedies filed on behalf of defendants Mericle and King. Service as to defendants  
4 Watson, Gaulden and Lun is not complete.

5 This action is proceeding on the complaint filed October 2, 2002. Plaintiff alleges  
6 that he is 69 years old with several serious medical problems including heart disease, back pain,  
7 thyroid problems, swollen prostate, hernia and arthritis. He alleges that he has been denied  
8 adequate medical care.

9 Defendant Correctional Officer Taylor-Thomas is located at High Desert State  
10 Prison (HDSP). Plaintiff alleges that in January 2002, defendant Taylor-Thomas searched  
11 plaintiff's property upon his arrival at HDSP. Complaint, p. 11. Defendant Taylor-Thomas took  
12 plaintiff's medication packet containing plaintiff's heart and pain medication. Id. Plaintiff  
13 alleges that he was without his medication for 17 days and that defendant Taylor-Thomas refused  
14 to return the medication. Id.

15 Defendant Johnson is located at California State Prison-Solano (CSP-Solano).  
16 Complaint, p. 15. Plaintiff alleges that on September 28, 2000, defendant Johnson refused to  
17 release plaintiff so that he could pick up his heart medication. Id. When plaintiff was able to  
18 pick up his medication, defendant Johnson charged plaintiff with refusing to work. Id.

19 In his opposition to the pending motion, plaintiff also claims that he is alleging  
20 that defendant Johnson harassed him on a daily basis. Opposition, p. 6. Plaintiff alleges that this  
21 harassment threatened his life. Id. Plaintiff may not amend his complaint by way of an  
22 opposition to a motion to dismiss for failure to exhaust administrative remedies. Accordingly,  
23 the court will not consider these new claims in evaluating the pending motion.

24 42 U.S.C. § 1997e(a) provides that, "[n]o action shall be brought with respect to  
25 prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in  
26 any jail, prison, or other correctional facility until such administrative remedies as are available

1 are exhausted.” In order for California prisoners to exhaust administrative remedies, they must  
2 proceed through several levels of appeal: 1) informal resolution, 2) formal written appeal on a  
3 CDC 602 inmate appeal form, 3) second level appeal to the institution head or designee, and  
4 4) third level appeal to the Director of the California Department of Corrections. Barry v.  
5 Ratelle, 985 F. Supp. 1235, 1237 (S.D. Cal. 1997) (citing Cal. Code Regs. tit. 15, § 3084.5). A  
6 final decision from the Director’s level of review satisfies the exhaustion requirement. Id. at  
7 1237-38.

8 In Booth v. Churner, 121 S. Ct. 1819 (2001) the Supreme Court held that inmates  
9 must exhaust administrative remedies, regardless of the relief offered through administrative  
10 procedures. 121 S. Ct. at 1825. Therefore, inmates seeking money damages must completely  
11 exhaust their administrative remedies. 42 U.S.C. § 1997e(a) provides that no action shall be  
12 brought with respect to prison conditions *until* such administrative remedies as are available are  
13 exhausted. McKinney v. Carey, 311 F.3d 1198 (9th Cir. 2002).

14 In the motion to dismiss, defendants state that they located five grievances that are  
15 pertinent to this case. These grievances are attached to defendants’ motion as exhibits A-E.  
16 These are the same five grievances submitted by defendants in support of the motion to dismiss  
17 filed February 20, 2004. In the November 23, 2004, findings and recommendations addressing  
18 defendants’ February 20, 2004, motion to dismiss, this court observed that defendants did not  
19 submit a declaration by a Litigation Coordinator stating that after searching plaintiff’s files they  
20 determined that these were the only relevant grievances filed by plaintiff. Defendants did not  
21 submit such a declaration in support of the instant motion.

22 The failure to submit a declaration stating that these were the only relevant  
23 grievances filed by plaintiff could have been a critical issue had plaintiff argued in his opposition  
24 that there were additional grievances related to the issues addressed in the pending motion.  
25 However, in his opposition, plaintiff only argues that these appeals should not be considered  
26 because they were not attached to the complaint. Plaintiff apparently mistakenly believes that

1 defendants' motion is brought pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim  
2 pursuant to which documents outside the complaint may not be considered by the court. In the  
3 order filed October 28, 2003, this court advised plaintiff of the requirements for opposing a  
4 motion to dismiss for failure to exhaust administrative remedies pursuant to Fed. R. Civ. P.  
5 12(b). Wyatt v. Terhune, 315 F.3d 1108 (9<sup>th</sup> Cir. 2003). Accordingly, the court turns to the  
6 merits of defendants' motion.

7           Attached to defendants' motion as exhibit A is appeal no. CSP-S-00-2292. In this  
8 appeal, filed by plaintiff while at CSP-Solano, plaintiff complained that he had not received his  
9 heart medication. In particular, plaintiff complained that on September 26, 2000, defendant  
10 Gaulden wrote plaintiff a prescription for several medications including Cordarone. On  
11 September 29, 2000, plaintiff had still not received his Cordarone. Plaintiff instead received the  
12 generic brand of this drug called Amiodarone. Plaintiff withdrew the appeal at the First Level  
13 because the issues had been resolved.

14           Appeal no. CSP-00-2292 does not concern plaintiff's claim that on September  
15 28, 2000, defendant Johnson refused to release plaintiff so that he could pick up his heart  
16 medication. Nor does this appeal concern plaintiff's claim that when he picked up his  
17 medication, defendant Johnson charged plaintiff with refusing to work. Accordingly, the court  
18 finds that appeal no CSP-00-2292 does not exhaust the claims against defendant Johnson.

19           Attached as exhibit E to defendants' motion is appeal no. CSP-01-2636. In this  
20 appeal, plaintiff complained about a September 18, 2001, incident involving his access to the law  
21 library. This appeal does not concern plaintiff's claims against defendant Johnson. Accordingly,  
22 the court finds that appeal no. CSP-01-2636 does not exhaust the claims against defendant  
23 Johnson.

24           The other three appeals submitted by defendants concern events occurring at  
25 HDSP. Accordingly, the court finds that the claims against defendant Johnson are not exhausted  
26 and should be dismissed.

1 Attached as exhibit B to defendants' motion is appeal no. HDSP B-02-00321. In  
2 this appeal, plaintiff complained that he did not receive his heart medication upon his arrival at  
3 HDSP in January 2002. Plaintiff stated that on January 2, 2002, Medical Technical Assistant  
4 (MTA) Bates told him that he would get his heart medication that evening. Plaintiff alleged that  
5 when MTA Bates stopped by to give him his medication that night, he did not have his heart  
6 medication. Plaintiff gave MTA Bates his heart medication list. This appeal did not allege that  
7 defendant Taylor-Thomas searched plaintiff's property upon his arrival at HDSP and took his  
8 medication packet. This claim against defendant Taylor-Thomas is different from the claim  
9 raised in appeal No. HDSP B-02-00321. Accordingly, the court finds that this appeal did not  
10 exhaust the claim against defendant Taylor-Thomas.

11 Attached as exhibit C to defendants' motion is appeal no HDSP 02-00416. In this  
12 appeal, plaintiff generally alleged that he was not receiving proper health care at HDSP. This  
13 appeal did not contain the specific claim made against defendant Taylor-Thomas in plaintiff's  
14 complaint. Accordingly, the court finds that this appeal did not exhaust the claim against  
15 defendant Taylor-Thomas.

16 Attached as exhibit D to defendants' motion is appeal no. HDSP 03-656. This  
17 appeal was granted in part on September 17, 2003, at the Director's Level of Review. However,  
18 plaintiff filed this action on July 29, 2002. Therefore, any claims raised in this appeal were not  
19 exhausted prior to plaintiff filing this action. Accordingly, the court will not consider this appeal  
20 in evaluating the administrative exhaustion requirement. McKinney v. Carey, 311 F.3d 1198 (9<sup>th</sup>  
21 Cir. 2002).

22 For the reasons discussed above, the court finds that the claims against defendant  
23 Taylor-Thomas are not exhausted.

24 Accordingly, IT IS HEREBY RECOMMENDED that the motion to dismiss filed  
25 June 3, 2005, on behalf of defendants Taylor-Thomas and Johnson be granted.

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These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: 10/31/05

/s/ Gregory G. Hollows

GREGORY G. HOLLOWS  
UNITED STATES MAGISTRATE JUDGE

ggh:kj  
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